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IN THE

Supreme Court of the United States

APRIL TERM, 1955

In the Matter of

LEE ROY MURCHISON

In the Matter of

JOHN WHITE

On a Writ of Certiorari to the Supreme Court of Michigan

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinions of the Supreme Court for the State of Michigan are reported in:

In Re White, 65 N.W. (2nd Ser.) 299; 340 Mich. 140.
In Re Murchison, 65 N.W. (2nd Ser.) 301; 340 Mich. 151.

STATEMENT OF JURISDICTIONAL GROUNDS

Inasmuch as the Court consolidated the cases of Lee Roy Murchison and John White it is our opinion that the statement of jurisdictional grounds as to each petitioner should be listed separately under the respective headings:

Lee Roy Murchison:

The opinion and judgment of the Supreme Court for the State of Michigan affirming the conviction of the petitioner

by the Trial Court (Recorders Court for the City of Detroit) was entered on the 6th day of July, 1954, the jurisdiction of this Court to review the judgment is invoked under the terms of Title 28, United States Code Annotated, Section 1257 (3). The petitioner by timely objections in the Trial Court contested the validity of a Judge of the Recorders Court or Trial Court, sitting as a grand jury and also as a Court (Record 35-37-38-86). The objections were over-ruled and the trial court continued the hearing (Record 38 et seq.). The petitioner was found guilty by Judge John P. O'Hara, Trial Judge of the Recorders Court and one man grand jury of the Recorders Court on May 14, 1954 (Record 180).

The objections were again renewed on petitioners' applications for leave to appeal to the Supreme Court for the State of Michigan (Record 2-3). The application for leave to appeal having been granted on 9th June 1954 (Record 1) and after argument the Supreme Court for the State of Michigan in its opinion of July 6, 1954 (Record 107 to 110) failed to pass upon petitioners' claims that the contempt hearing before the Trial Judge constituted a denial of due process of law as required by the Fourteenth Amendment (App. p. 33) but was content to rest its opinion on the theory that petitioners conduct before the grand jury could at one and the same time be the subject of perjury and contempt (Record 110). Petitioners obtained a stay of the mandate of the Court pending perfection of his application for certiorari.

In re: John White:

The opinion and the judgment of the Supreme Court for the State of Michigan was entered on the 6th day of July 1954, confirming the conviction for contempt of the Recorders Court for the City of Detroit on May 28, 1954 (Record 177). Petitioner by Motion to Dismiss the Order to Show Cause timely applied for appropriate relief in the Trial Court prior to the taking of any testimony. The bases for the motion to dismiss were as follows:

1. The Order to Show Cause was filed by the one man grand jury and/or Judge and not by a competent public official.

2. That the trial of the contempt citation should be assigned to another Judge other than Judge O'Hara acting as a one man grand jury.

3. That the grand jury statute constituted an unlawful delegation of legislative and executive functions to a judicial officer in violation of Article 4, the Constitution of 1908 of the State of Michigan (Record 156).

4. The one man grand jury statute violates the due process clause of the 14th Amendment of the Constitution of the United States (Record 156-157-158).

These objections were over-ruled by the Trial Court (Record 174) and the petitioner found guilty (Record 177). The same objections were again made in the petitioner's application for leave to appeal to the Supreme Court for the State of Michigan (Record 128-129). The said application was granted on June 9, 1954 (Record 182). The Supreme Court for the State of Michigan in its opinion of July 6, 1954, by-passed the Federal issues raised as to due process (Record 183 to 191) and contented itself with construing the statute by asserting that a Judge of the Recorders Court (Trial Court), sitting as a one man grand jury, was acting in a judicial capacity and as a consequence could punish for contempt committed in the presence of the Court (Record 190). The Court further held that the legislation did not intend a witness to have legal counsel while testifying before a one man grand jury. Petitioner obtained a stay of the mandate of the Supreme Court for the State of Michigan pending the perfection of his application for a writ of certiorari in this Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 28.933-28.944, Michigan Statutes Annotated: Callaghan's Pocket Supplement 92-103.

2. Article IV of the Michigan Constitution 1908, Division of the Powers of Government.

3. Constitution of the United States of America—Article 14, Section 1.

Inasmuch as the provisions involved in the above-cited statutes and constitutional provisions are lengthy, the pertinent texts thereof are set forth in the appendix.

QUESTIONS PRESENTED

1. Is the one man grand jury statute constitutional?

2. Can the Judge at one and the same time be a one man grand jury and still have the inherent power to adjudicate one in contempt while acting in a so-called judicial capacity without violating the concept of due process of law as assured by the 14th Amendment of the Constitution of the United States?

3. Does the interpretation given to Section 28.944 of the Michigan Statute by the Supreme Court of Michigan amount to a denial to the petitioners of their constitutional rights of due process?

4. Was not the interpretation of the Supreme Court of Michigan of Section 28.943, Michigan Statute Annotated, to the effect that "a witness was entitled to have legal counsel before or after being subpoenaed, and prior to his being called as a witness, or at such other times in the discretion of the grand juror" not only an expressed violation of the terms of the Michigan Statute but a violation as well of the constitutional rights of the petitioners?

STATEMENT OF CASE

In the Matter of John White

On March 16, 1954, Judge John P. O'Hara, one of the Judges of Recorder's Court for the City of Detroit, County of Wayne, State of Michigan, was selected and appointed to conduct a one man grand jury under Section 28.943, Michigan Statutes Annotated, and following sections appurtenant thereto, to investigate police corruption in connection with gambling (R. p. 133). He entered upon his duties the following day and the investigation commenced immediately.

The petitioner herein, John White, was subpoenaed to testify before Judge John P. O'Hara, grand juror, on May 21, 1954, and in response to said subpoena did appear before Judge John P. O'Hara sitting as a one man grand juror on May 21, 1954 (R. pp. 136-137).

On examination before Judge John P. O'Hara, the petitioner White stated his name and on being asked other questions declined to answer and did refuse to answer any questions "unless my attorney is here with me at all times, from the beginning to end." (R. pp. 138-142.)

On May 24, 1954, an order to show cause was entered requiring John White to show cause why he should not be punished for contempt for refusal to answer any and all material questions put to him as a witness before the grand jury (R. pp. 136-137). The order to show cause was returnable May 28, 1954, at which time petitioner herein did appear in response to said order returnable before John P. O'Hara as Recorder's Judge (R. pp. 145-146). By stipulation the transcript of testimony given by White on May 21, 1954, before the grand jury was admitted in evidence (R. p. 146). The essence of that transcript of testimony is to the effect that White refused to answer unless accompanied by counsel as hereinbefore set forth. Counsel for the respondent entered an objection to the proceedings before Judge O'Hara for the reasons the Act in question was unconstitutional and that Judge O'Hara

as Recorder's Judge was disqualified from hearing a contempt of this nature and based these objections upon the 14th Amendment of the Constitution and Article IV of the Michigan Constitution, Michigan Statutes Annotated, 1953 Cumulative Supplement, Paragraph 28.944 (App. pp. 28 and 33) which provides in part:

> "... The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objections and found the respondent guilty of contempt and sentenced him to be confined in and/or at Detroit House of Correction for a period of Ninety (90) days and that he pay a fine of Two Hundred Fifty ($250.00) Dollars (R. pp. 176-178). Counsel for petitioner requested a stay of proceedings until application for leave to appeal to the Supreme Court for the State of Michigan was granted (R. p. 177). Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted (R. p. 177).

The application for leave to appeal posed the following questions: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Is a Judge for the Recorder's Court under C.L.S. 1952, Paragraph 767.3, M.S.A. Cum. Supp., Paragraph 28.943, disqualified by the provisions of C.L.S., 1952, Paragraph 767.4, M.S.A. Cum. Supp., Paragraph 28.944, for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt rose in the course of a grand jury investigation in the presence of him as a grand juror? (3) Is

counsel for a witness called before a one man grand jury entitled under C.L.S. 1952, Paragraph 767.3 M.S.A., Cum. Supp. Paragraph 28.943 to be present in the grand jury room during the testimony of this client? The Michigan Supreme Court on July 6, 1954, affirmed the lower Court. (4) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safeguards while acting in an administrative capacity? (5) Does the legislature have the authority to impose upon the judiciary duties that are not judicial? (R. pp. 127-130.)

The petitioner immediately filed a motion for a rehearing with the Supreme Court for the State of Michigan, and the petitioner was released on bail in the amount of Three Thousand ($3,000.00) Dollars by the Court pending a decision on the motion for rehearing (R. p. 205). That on the 8th day of September, 1954, the Court denied the motion for rehearing (R. p. 206). That following the denial of the motion for rehearing the petitioner White made application for a stay of proceedings with the Court pending his application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth (R. p. 206).

On the 14th day of September, 1954, the Court granted a stay of proceedings pending application for Writ of Certiorari in the Supreme Court of the United States conditioned that said application be fled within thirty (30) days from the 14th day of September, and the petitioner was released on bond in the sum of Three Thousand ($3,000.00) Dollars (R. p. 206). The Supreme Court of the United States on the 6th day of December, 1954, entered its Order allowing a Writ of Certiorari as prayed for by the petitioner (R. p. 207).

In the Matter of Lee Roy Murchison

That the petitioner, Lee Roy Murchison, was subpoenaed to testify before Judge John P. O'Hara, grand juror, and in response to such subpoena did appear on that date be

fore Judge John P. O'Hara sitting as a one man grand jury (R. p. 4).

On examination before Judge John P. O'Hara, certain witnesses did testify with respect to visits made by Murchison to the residence of one Edward Stephens (R. pp. 9-39-40-51-52-53). The petitioner denied in secret session ever having visited the residence of Edward Stephens and was contradicted by two police officers. The other police officer, to wit, a Lieutenant of the Police Department and an Inspector, testified that they had seen Murchison visiting the home of Edward Stephens at 945 Josephat, Detroit, Michigan, and introduced a purported picture of Murchison on the front porch of that address (R. 9-11-12).

On May 6, 1954, Judge O'Hara acting as a one man grand jury issued an order to show cause directed to the petitioner requiring him to show cause why he should not be punished "for criminal contempt of this Court" for false swearing (R. p. 7-8). This order to show cause was returnable on a day certain, and beginning Monday, May 10, 1954, and continuing through Wednesday, May 14, 1954, the petitioner did appear in response to said order returnable before Judge O'Hara (R. 30). Counsel for petitioner entered an objection to the proceedings before Judge O'Hara for the reasons that the Statute was unconstitutional and that Judge O'Hara as Recorder's Judge was disqualified from hearing a contempt of this nature and based his objection upon Michigan Statutes Annotated 1953 Cumulative Supplement, Paragraph 28.944 (App. p. 28) which provides in part:

> ". . . The Judge conducting an inquiry under Section 3 of this Act shall be disqualified from acting as the examining magistrate in connection with the hearing on any complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under Section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Judge O'Hara overruled the objection and found the respondent guilty of contempt and sentenced him to be confined in the County Jail of Wayne County for a period of Sixty (60) days (R. p. 105). Counsel for petitioner requested a stay of proceedings until application for leave to appeal to the Supreme Court for the State of Michigan was granted. Judge O'Hara granted a stay of proceedings and upon applying for leave to appeal the same was granted (R. p. 106).

The application for appeal posed a number of questions among which were the following: (1) Is the Statute in question unconstitutional because it is contrary to the due process clause of the Fourteenth Amendment, Art. IV of the Michigan Constitution? (2) Was Judge O'Hara sitting as a one man grand jury under the pertinent sections of the Statute disqualified by the provisions of the Statute for citing a witness for contempt and thereafter hearing the contempt proceedings himself where the alleged contempt laws in the course of a grand jury investigation in the presence of him as a grand jury? (3) In assuming the duties of a grand jury, did Judge O'Hara continue to be vested with judicial functions and/or safe guards while acting in an administrative capacity? (4) Does the legislature have the authority to impose upon the judiciary duties that are not judcial? (R. p. 3.)

On July 6, 1954, the Supreme Court affirmed the Lower Court (R. pp. 107-108-109-110). That the petitioner immediately filed a motion for rehearing with the Court, and was released on bail in the amount of Three Thousand ($3,000.00) Dollars, pending a decision on a motion for rehearing (R. pp. 111-124).

On the 8th day of September the Court denied the motion for rehearing (R. p. 125) That following the denial of the motion for rehearing the petitioner Murchison made application to the Supreme Court of the United States of America for leave to file a Writ of Certiorari to review the proceedings hereinbefore set forth (R. p. 126).

The Supreme Court of the United States on the 6th day of December, 1954, entered its Order allowing the Writ of Certiorari as prayed for by the petitioner (R. p. 207).

SUMMARY OF ARGUMENT

1. History of Development of one-man grand jury act as related to instant cases.

2. One-man Grand Jury Act is unconstitutional as promulgated.

3. One-man Grand Jury Act is unconstitutional because in its functioning it lends itself to the violation of basic constitutional rights.

4. In instant cases, interpretations given the Michigan Statutes involved, demonstrate violations of constitutional rights of petitioners.

ARGUMENT

History

Prior to adoption of the present Constitution (1908) of the State of Michigan, the previous Constitution required that Criminal prosecutions be begun by presentment or indictment issued by a traditional grand jury. With the compulsory provision of the Constitution of 1835 no longer in effect, the legislature for the State of Michigan enacted in 1917 the so-called One Man Grand Jury Act. The effect of such legislation was to vest in a single individual (Judges of Courts of Record, Police Judges and Justices of the Peace) the power to investigate crime and issue indictments as a result of such investigation. The effect of such legislation resulted in much litigation and attendant criticism. Mr. Justice Black, in *Re: Oliver, 333 U.S. 257 (203), 93 L. Ed. 682 (689)* characterized the One Man Grand Jury in the following language:

> "In carrying out this authority a judge-grand jury is authorized to appoint its own prosecutors, detec

> tives and aides at public expense, all or any of whom may, at the discretion of the justice of the peace or judge, be admitted to the inquiry. Mich. Stat. Ann. § 28.944 (Henderson 1938). A witness may be asked questions on all subjects and need not be advised of his privilege against self-incrimination, even though the questioning is in secret. And these secret interrogations can be carried on day or night, in a public place or a 'hideout', a courthouse, an office building, a hotel room, a home or a place of business; so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the 'portable grand jury' ".

It is our reasoned opinion that such characterizations, together with the language of other Justices touching upon this proposition and the decision had in Re: Oliver resulted in the legislature for the State of Michigan repealing the Act. In its stead the legislature created a three-judge grand jury, which Act was shortly thereafter repealed and the present Act substituted (App. p. 26).

It will be noted that the newest edition of the one-man grand jury attempted to set-up safeguards for the protection of individuals among other things by deleting certain objectional features. Attention is called to the following language of the Act:

> "Provided, That the (judge) conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereto, (except alleged contempt for neglect or refusal to appear in response to a summons or subpoena)."

These safety values or protection of personal rights were not contained in the Act of 1917.

In the instant causes the Supreme Court for the State of Michigan by its decision removed this protection and re-

turns to the original idea of an investigating and executive official arriving at a purported judicial conclusion and pronouncement in camera. The issuance of an order to show cause after a so-called judicial finding is a farcical attempt to pay homage to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We now address ourselves by way of concise argument to each of the respective questions posed, urging each as a reason why the relief sought by petitioners should be granted.

1. Is the One Man Grand Jury Statute Constitutional?

The question of the constitutionality of the Grand Jury Statute in Michigan has previously been before this Court but has never been expressly passed upon. In this connection, we call attention to the fact that in the case of Re Oliver, 333 U.S. 257, 92 L. Ed. 682, the necessity of this Court determining the constitutionality of the Michigan Grand Jury Statute is evidenced. Mr. Justice Black, in delivering the majority opinion in this case, uses the following language:

> "The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquizitory grand jury power to a single Judge, and, therefore, we do not concern ourselves with that question."

In the instant case this question of the inherent unconstitutional power of Michigan to function through a one man grand jury was raised at the threshold and carried through each step of the presentations in the courts below. The constitutionality of this one man grand jury we believe to have been effectively challenged in the above cited case by the language of Mr. Justice Rutledge in his concurring opinion:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically

separate powers of grand jury, committing magistrate, prosecutor, trial judge, and petit jury * * *.

"This aggregation of powers and inherent concomitant denial of historic freedoms were unknown to the common law. * * * They are altogether at variance with our tradition and system of government. * * * They cannot stand the test of constitutionality * * * there is no semblance of due process * * * *"

Even in the dissenting opinion of Mr. Justice Frankfurter in the cause above referred to, it is evident that the position of this Court is that the constitutionality of the one-man grand jury system in Michigan should be passed upon only when the issue has been properly raised in the Court below and such courts have had an adequate opportunity to pass upon same, and where the record shows what actually happened under this circumstance so that this Court might properly determine as to whether such procedure offends the due process clause of the 14th Amendment of the Constitution of the United States. It is respectfully urged that the instant case meets this requirement and affords such an opportunity to this Court.

Traditionally, a grand jury, common law or statutory, is an investigating body and its final act, if the circumstance warrant, is the issuance of an indictment against the accused. At no time does it make any adjudication or function in a judicial capacity.

"The grand jury is not a judicial tribunal, but rather a functional and accusing body."

State v. Lawler 267 Wis. 412; 105 A.L.R. 568;
Coblentz v. State 164 Md. 558; 166 A. 45.

The anomalous situation that obtains in Michigan vests in one and the same individual, the investigation and accusatory powers of a grand jury and at the same time the powers of a judicial officer. It is this combination of the historically separate and distinct powers that renders the Michigan procedure vicious, and inherently and diametri-

cally opposed to the basic concepts of freedom from oppression as guaranteed by the Fourteenth Amendment.

2. *Can the Judge at One and the Same Time Be a One Man Grand Jury and Still Have the Inherent Power to Adjudicate One in Contempt while Acting in A So-Called Judicial Capacity without Violating the Concept of Due Process of Law as Assured by the 14th Amendment of the Constitution of the United States?*

In addressing ourselves to question Number Two (2), we face the interpretation of the functioning of a one-man grand jury by the Supreme Court of Michigan as enunciated in the instant cases. The Michigan Supreme Court presumably relied on the case, among other things, of *In Re Slattery*, 310 Mich. 458, 17 N.W. (2d) 249, cited in People's Reply Brief to Respondent's Supplemental Brief. The quotation from that Reply Brief is:

> "So that there may be no further question, we hold that the Judge conducting the one-man grand jury proceedings is acting in a judicial capacity."

It is here urged that the Court can not at one and the same time function as a one man grand jury and reserve to itself the functioning of a Court so as to make possible the adjudicating of an individual as being in contempt of said court. In acting as a grand jury, it is acting in an administrative and/or executive capacity. In acting as a court it is, by definition, acting in a judicial capacity. To combine these functions is in derogation of *Article IV of the Constitution of the State of Michigan*. (Appendix, p. 33) Whenever the question has been presented as to whether a grand jury inquiry is a judicial one in the sense of exercising of judicial power, the courts have answered in the negative. *State* v. *Lawler*, 221 Wis. 432, 267 N.W. 65, 105 A.L.R. 568; *Cobleutz* v. *State*, 164 Md. 558, 166 A. 45. In order to determine whether a person or body functions

as a court or in some other capacity, it s necessary to consider more than the character of the individual or actor. This Court has said in *Prentiss* v. *Atlantic Coast Line*, 211 U.S. 210, 53 L. Ed. 150, that:

> "It is the nature of the final act that determines the nature of the previous inquiry."

A grand juror's final act is the issuance of a warrant. He determines no issues and makes no adjudication. The final action in the instant cases by which the petitioners are aggrieved is an adjudication of contempt which is unquestionably a judicial determination. It is anomalous to say that one individual can at one and the same time exercise both of these functions. This cannot be better demonstrated than by the use of the words of Mr. Justice Rutledge in *Re Oliver*, *supra*, which though repetitive, we here set forth:

> "Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury * * *."

Where, as there, there is the attempt on the part of the one-man grand jury to exercise the combined functions of a grand jury, a petty jury, a prosecutor, and of a trial judge, the denial to these petitioners of due process of law is emphasized. Even if the statutory allowance of a one-man grand jury be conceded as being constitutional, there can be no conceivable question but that the functioning as a one man grand jury is violative of the individuals' rights to due process of law as assured under the 14th Amendment of the Constitution of the United States. As to this fundamental proposition, this Court has spoken over a long period of years and without variance. *Kennard* v. *Louisiana*, 92 U.S. 480, 23 L. Ed. 478; *Hurtado* v. *California*, 110 U.S. 516, 28 L. Ed. 232; *Moore* v. *Dempsey*, 261 U.S. 85, 67 L. Ed. 543.

That so called grand jury here was investigator, prosecuter and compiainant is strongly emphasized in the Murchison case by the fact that no complaint, petition, or affidavit was filed in support of the issuance of the order to show cause. That order was issued by the Judge on the basis of what existed in his own mind, i.e., of his personal knowledge of the facts without any other basis and indicated clearly that he had already made a decision as to the guilt of petitioner. That order recites in fact that "the testimony given by Murchison was false and constitutes criminal contempt." (See Record, p. 8.) The order further directs Murchison to appear at a stated time and show cause "why he should not be punished for criminal contempt of this Court because of his aforesaid act." (Record, p. 8.) Thus it appears that regardless of the so called open and public hearing held by the court on this show cause, the judge had already predetermined Murchison's guilt for contempt, and that the hearing was for the purpose of determining the amount of punishment to be imposed upon him.

It is obvious that in holding such a public hearing, the trial court was endeavoring to avoid infringement upon the constitutional guarantees of the Fourteenth Amendment and the mandates specifically laid down by this court. *In re Oliver*, 333 U.S. 257, 92 L. Ed. 682. However, that case as well as many other cases decided by this court require that in addition to any public hearing opportunity to confront the accusers, produce witnesses and have counsel, there must also be a fair and impartial tribunal. A tribunal which has prejudiced a case and has made a predisposition can not be said within the meaning of the constitutional guarantees to be a fair and impartial tribunal.

See *Tumey* v. *Ohio*, 273 U.S. 510; 47 S. Ct. 437, 71 L. Ed. 749;

Jordan v. *Massachusetts*, 225 U.S. 167; 32 S. Ct. 651, 56 L. Ed. 1038;

Adams v. *U. S. ex rel. McCann*, 625 S. Ct. 236, 87 L. Ed. 268;
Cooke v. *U. S.*, 267 U.S. 257; 45 S. Ct. 390, 69 L. Ed. 767;
In re Dingley, 182 Mich. 44, 148 N.W. 218.

The condemnation of the procedure countenance by the Michigan authorities has been condemned in strong language. *In re Richardson*, 247 New York 401, 160 N.E. 654, in an opinion by Judge Cardoza it was held:

> "The judge is made a prosecutor. He is to have his counsel and assistant counsel and experts and detectives * * * the outstanding fact remains that his conclusion is to be announced upon a case developed by himself. Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work. We should be sorry to weaken this tradition by any judgment of this Court."

See opinion of Mr. Justice Rutledge concurring in *re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682.

3. Does the Interpretation Given to Section 28.944 of the Michigan Statute by the Supreme Court of Michigan Amount to a Denial to the Petitioners of Their Constitutional Rights of Due Process?

The Michigan Statute having to do with the setting up of the one-man grand jury, reading in part from Section 28.944, sets forth as follows (Appendix, p. 29):

> "* * * Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or *from hearing and charge at contempt* under section 5 hereof * * *" (Italics ours.)

The foregoing is a part of *Public Act No. 270, 1954, State of Michigan*, effective September 28, 1954. We believe that

there can be no question but that this was an attempt on the part of the State of Michigan to meet issues posed by this Court in its decision in the case of *Re Oliver, supra*. The Supreme Court of Michigan in interpreting the foregoing part of the statute in the instant case, in *Re White*, in the language of Judge Sharp held:

> "It follows that the legislature has no power to deprive a constitutional court, * * * of its power to punish for contempt committed in its presence * * *."

It seems to us apparent that the Michigan Supreme Court, in adopting this language, loses sight of the fact that the person here functioning and who is adjudicating persons in contempt on the theory of being a Court is the same individual whom the legislature was creating as a one-man grand jury, and whom, it apparently expressly intended, should not have these anomalous powers. This interpretation simply re-creates the possibility which apparently the Michigan Legislature desired to correct; of giving such a basis for denial to persons situated as these petitioners of their constitutional rights of due process. Aside from it being a denial of due process per se, it is certainly directly opposed to the underlying decision in *Re Oliver, supra*, and to the apparent corrective step undertaken by the Michigan Legislature.

4. *Was not the Interpretation of the Supreme Court of Michigan of Section 28.943, Michigan Statute Annotated, to the Effect that "a Witness was Entitled to Have Legal Counsel Before or After Being Subpoenaed, and Prior to His Being Called as a Witness, or at Such Other Times in the Discretion of the Grand Juror" not Only an Expressed Violation of the Terms of the Michigan Statute but a Violation as Well of the Constitutional Rights of the Petitioners?*

The *Michigan Statute Annotated, section 28.943* (Appendix, p. 26) sets forth in part as follows:

"* * * Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry *without being subject to a citation for contempt.*" (Italics ours.)

It seems to us a distortion of language or an unjustified interpretation of unambiguous language when the Supreme Court of Michigan, speaking through Judge Sharp in the *White* case, in interpreting the foregoing language, indicates that:

"* * * A witness was entitled to have legal counsel before or after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand jury * * *".

It is to be remembered that the adjudication of contempt in the *White* case was presumably not based upon any refusal on the part of White to testify but rather upon his refusal to testify without having the advantage of counsel. The language of the Statute here again is an apparent attempt to meet issues created by the decision of this Court in *Re Oliver*, *supra*, and to correct abuses which the one-man grand jury principle gave rise to. White, we respectfully submit, was exercising his constitutional rights assured him by the Constitution of the United States and expressly reiterated by the Michigan legislature in the language above quoted when he refused to answer questions without the privilege accorded him of having counsel to advise him. The extent to which the rights of the petitioners might be violated is demonstrated by the fact that the refusals were not categorical refusals but rather an expression of unwillingness to be committed to propositions without the exercise of a right to which he was legally entitled. It is to be noted further in this connection that in each instance the petitioners were served with orders to show cause. The language of these orders is

in and of itself significant and condemnatory of the practice engaged in by the one-man grand jury, who at once and the same time adjudicates for alleged contempt committed in his presence. There is no requirement to show cause why the petitioners, respectively, should not be adjudicated in contempt but rather that they should show cause why they should not be punished for the contempt already adjudicated. This is essentially a trial in camera and expressly forbidden by the Constitution of the United States and as recently pointed out in *Re Oliver, supra.*

It cannot be reasonably argued that any distinction in this constitutional right can be made between a witness and a defendant, particularly when the so-called witness faces, as here, an adjudication of contempt and a penalty imposed. Particularly is this true where, as here, reliance is upon a statute, the language of which is clear. Where the language of a statute is plain and unambiguous, there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning.

The Supreme Court of Michigan in its opinion in the instant case has held that petitioner White was not entitled to the benefit of counsel while before the one-man grand jury for the reason "that a witness before a grand jury is not on trial for any offense and that secrecy is a paramount adjunct of a grand jury." (Trans. Record, p. 191.) The reasoning of that court is based upon the apparently simple proposition that White was merely a "witness" before the grand jury. The record in the instant case, however, follows that the grand jury was established for the purpose of investigating in the operation of numbers syndicates and the relation of certain police officers therewith, and that White called as a witness to the inquiry was specifically interrogated in a manner definitely directed to establishing his criminal connections with the offense involved. He was thus immediately placed in the position of a potential defendant and as such a potential defendant he was entitled to the benefit of the constitution-

al guarantees of due process which among other things included the right to advice of counsel.

> See *Powell* v. *Alabama*, 287 U.S. 45, 68, 70; 53 S. Ct. 55, 63, 64, 77 L. Ed. 158;
> *Avery* v. *Alabama*, 308 U.S. 444, 6 S. Ct. 321, 84 L. Ed. 277.

In *People* v. *Bermel*, 71 N.Y. Miscel. 356, 26 N.Y. Criminal Rep. 47, an indictment growing out of a grand jury was quashed and the court said:

> "Briefly stated, if the person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be supboenaed and sworn, even though he claim no privilege. * * * The party testifying may, in fact, be the defendant or the party proceeded against, and not a mere witness, although he be not under arrest or openly chaged with crime or proceeded against in name. The title of the proceedings cannot determine rights, as constitutional privilege is one of substance and not of form. If the person examined before the grand jury be in fact the one aimed at, sought for, and charged with the crime, the title of the proceedings cannot make his examination legal."

The reasoning is likewise found in *People* v. *Mondon*, 103 New York 211, 8 N.E. 496, and the court carrying through to a logical end said:

> "* * * It thus appears that when the prisoner was called upon to make his statements on oath before the coroner, he stood in the attitude of an accused person, and was required to answer for himself, *as a party, and not as a mere witness to aid the coroner in investigating the cause of the death of the deceased.* * * * From that time the prisoner accepted the same position of a person accused of crime, and his situation was similar to that of such a person before an examining magistrate, 'and although the tribunal might be different, yet, upon principle, his rights would be the same in both cases' (10 N.Y. 48, and in Teachout V. People

> (41 N.Y. 9), Woodruff, J., in commenting upon the cases of McMahon v. People (15 N.Y. 384), says: 'The coroner acting substantially in the place of any examining magistrate, and the fact that the prisoner was held under arrest without warrant, could not make his protection against such an inquisition less imperative; * * * '"

It therefore follows that as an accused, the petitioner would have the constitutional right as well as the statutory right to have counsel at every stage of the proceedings.

That the procedure under the Michigan one man grand jury statute is most unusual is emphasized by the fact that a witness testifying falsely before that body can under the decision of the Supreme Court be guilty at one and the same time of contempt of court for testifying falsely before that body as a court and guilty of perjury for testifying falsely before that body as a grand jury. The witness is thus placed in the position of being subject to double prosecution and double jeopardy for one and the same act. As stated by Mr. Justice Rutledge in his concurring opinion in *Re Oliver, supra:*

> "It takes away the security against being twice put in jeopardy for the same offense. * * * "

Even considering the tribunal as a "Court" it does not appear that the allegedly false testimony of the witness has impeded and embarrassed the administration of justice. In fact this court has on a number of times held that such false swearing cannot constitute contempt but must be punished by an independent proceeding for perjury.

The following quote from *in re Michael*, 326 U.S. 324, 66 S. Ct. 78, 90 L. Ed. 30, is apropos:

> "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth

> from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this court spoke when it decided that perjury alone does constitute an 'obstruction' which justifies exertion of the contempt power and there 'must be added to the essential elements of perjury under the general law of the further elements of perjury under the general law of the further element of obstruction to the Court in performance of its duty.'" Exparte Hodgings, supra, 249 U.S. 382, 383, 384, 39 S. Ct. 339, 340, 63 L. Ed. 656, 11 A.L.R. 33. And the Court added "the presence of that element (obstruction) must clearly be shown in every case where the power to punish the contempt is exerted."

It is submitted that these additional elements are not present in the matter of Lee Roy Murchison.

In *ex parte Hudgings*, 249 U.S. 378, 39 S. Ct. 337, 63 L. Ed. 656, the court said:

> "It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would retain to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court, would be gravely imperiled."

The situation with respect to petitioner White is even more unusual. The record shows that White was adjudicated in contempt because of a refusal to testify on the ground that he required the advice of counsel. The statute

under which the grand jury was proceeding expressly provided that petitioner "shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt." (App. p. 26)

It does appear that White has been condemned for exercising a right granted to him by the legislature of the State of Michigan which at the time of his refusal to answer had not been the subject of adjudication by any courts of the State.

One of the essential elements of contempt of court is the element of bad faith, the intent to obstruct and impede the administration of justice. How the existence of such intent can be drawn from the respectful refusal to answer based upon a statutory right set forth in plain words is altogether adverse with several rules at law and constitution principles.

The last amendment act 276 P.A. 1951 of the State of Michigan (App. p. 26) was a deliberate and studied effort of the legislature to curtail the powers of the one man grand jury differentiating between his functions as prosecutor, investigator and judicial officer preventing him from sitting and trying as judge cases which he had investigated and prosecuted, and provided for the protection of persons brought into examination by allowing them the assistance of counsel.

CONCLUSION

From the history as set forth in the beginning of our argument as to the creation, operation and functioning of the one-man grand jury, we think that it logically follows that the co-mingling of functions as set forth in this brief in one individual is entirely inconsistent with our American form of Government. We believe it impossible for the Act to be put into effect without the violation of the constitutional rights of persons affected; and, therefore, urge this Court to declare same unconstitutional.

In the instant cases the decisions affecting the individuals involved are contrary to their basic rights under the 14th Amendment to the Constitution of the United States. The fact that the Michigan Courts could arrive at any such decisions under the Act, despite the clear chart given by the Legislature demonstrates the inherent unconstitutional possibilities underlying the Act and requires that same should be stricken from the Statute books.

Respectfully submitted,

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APPENDIX

Sections 28.943-28.944: Michigan Statute Annotated: Callaghan's Pocket Supplement, 92-103

§ 28.943 Proceedings before trial; investigation of suspected offenses by judge of court of record; inquiry; witnesses; participants in inquiry, disqualification from appointment or election.] SEC. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, • [or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record] shall have probable cause to suspect that any crime, offense or misdemeanor • shall have been committed within his jurisdiction • [, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry: Provided, That in any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as such judge may require concerning any violation of law about which they may be questioned within the scope of the order;] and the proceedings to summon such [witness] and to compel [him] to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall • [not receive any compensation or remuneration other than witness fees as paid witnesses] in other criminal proceedings • [, and said witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the said inquiry being conducted.] Whenever a subpoena shall be issued by the

[judge] conducting such inquiry, commanding the appearance of a witness before such [judge] forthwith upon the service of such subpoena, and, following the service thereof, such witness arrives at the time and place stated in such subpoena, the [judge] so issuing the same shall be [forthwith] notified of such [appearance] by the officer serving the subpoena, and it shall thereupon be the duty of such [judge forthwith] to appear and take the testimony of such witness •. [Any person called before the grand jury shall at *all times* be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. All matters so revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in said section. No testimony shall be taken or given by any witness except in the presence of the judge.]

Any [judge,] prosecuting [attorney] or special prosecuting [attorney,] or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of such inquiry: Provided, That such disqualification shall not extend more than [1] year from date of termination of such inquiry, as determined by final order of said [judge] entered prior to such date. •

§ 28.944 Same; apprehension of suspected person; disqualification of investigating judge in later proceedings; removal of public officers, procedure; disclosure of information, exceptions, penalty; report of no finding of criminal guilt; limitation of period of inquiry; inability to continue inquiry, appointment of successor judge.] SEC. 4. If upon such inquiry the [judge] shall be satisfied that any offense has been committed and that there is probable cause to supect any person or persons to be guilty thereof, [he] may cause the apprehension of such person or persons by proper process, and upon the return of such proc-

ess served or executed, the [judge] having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint: [*Provided, That the [judge] conducting the inquiry under section 3 of this act shall be disqualified from acting as the examining magistrate in connection with the hearing* • *or the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5 hereof* [, *except alleged contempt for neglect or refusal to appear in response to a summons or subpoena*]. And if upon such inquiry the [judge] shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance [in] office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the said [judge] shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charges. • [Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state,] any [judge] conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such [judge] be admitted to such inquiry, who shall while [conducting such inquiry or while]

in the services of [such judge] or after his services with [such judge] shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or [under] recognizance, or who shall disclose that any person has been questioned or [summoned] in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than [$1,000.00] or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry [if] the judge shall make no presentment of crime or wrong-doing as to any person or persons whose apprehension or removal from office he has not so caused, [he] may, in his discretion, [with the consent of the person who may be named,] file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

[No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.]

In the event any [judge] conducting such inquiry shall be unable to continue therein because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

§ 28.944(1) Same; secrecy of proceedings, exceptions, penalty.] SEC. 4a. It shall be unlawful for any person,

firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

§ 28.945] Same; failure of witness to appear or answer questions; penalty. SEC. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such [judge] may require [as] material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding [$1,000.00] or imprisonment in the county jail not exceeding [1 year] or both at the discretion of the court: Provided, That if such witness after being so sentenced shall [offer to] appear • [before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness,] the [judge] may in [his] discretion commute or suspend the further execution of such sentence.

§ 28.945(1) Same; confidential and priviliged communications.] SEC. 5a. In any inquiry authorized by this act • communications between reporters [of] newspapers or other publications and their informants • [are hereby declared to be privileged and confidential. Any communications] between attorneys and their clients, between clergymen and [the] members of their respective churches, and between physicians and their patients • [are hereby declared to be privileged and confidential when such communications were necessary to enable such attorneys, clergymen, or physicians to serve as such attorney, clergyman, or physician].

§ 28.946 Same; incriminating answers of witness; granting of immunity to witness, procedure, secrecy, scope.] SEC. 6. No [witness] shall upon such inquiry be required to answer any questions, [or] shall be convicted for contempt upon refusal to do so, when the answers might tend to incriminate him. [A written order granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such judge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.]

§ 28.946(1) Same; sealing and filing of docket, journal, reporters' notes, transcript and other records on termination of inquiry; secrecy; availability of transcript and record to witness in subsequent proceedings; destruction of

transcripts, notes and records.] SEC. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit could of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall

enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

§ 28.946(2) Same; accounting of monies disbursed, filing after termination of inquiry.] SEC. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

ARTICLE IV OF THE MICHIGAN CONSTITUTION OF 1908 DIVISION OF THE POWERS OF GOVERNMENT

Departments of Government. SECTION 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Limitations of powers of officers. SECTION 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.